STATEMENT

This is a companion case to *International Association of Machinists, et al. v. Central Airlines, Inc., October Term, 1962, No. 61*, now pending in this Court. The six employees involved in that pending case were discharged for failure to attend a disciplinary hearing while under suspension, at which time they were denied union representation. The instant case arose from a strike which was called to protest this failure to permit union representation. There is no factual issue as to the purpose of the strike (Pl. Ex. 4-C-U-5; S. F. 524, S. F. 553[1]). Respondent conceded in its First Amended Original Answer (Tr. pp. 30-31[2]) that the stated reason for the strike "was the alleged refusal of the defendant, Central Airlines. to permit Union representation at the inquiry or investigation * * *." And the trial court acknowledged that the purpose was to obtain "a hearing and representation" (Tr. p. 151). The Court of Appeals agreed that such was the purpose (Appendix A, pp. 4a, 6a, *infra*), adding its legal conclusion that the six employees "were entitled to refuse any interviews without benefit of the presence of an advisor if they so chose." (Appendix A, p. 3a, *infra.*)

When the strike began, respondent promptly made a determination that all of the strikers were terminated as of the time they went out on strike (S. F. 346, 354), and during the course of the strike replacements were hired.

[1]S. F. refers to "Statement of Facts," the stenographic record of the trial.

[2]Tr. refers to the "Transcript," the compilation of pleadings and orders in the trial court.

During the strike, "neither the company nor the union sought any relief through the machinery of the courts, or through any grievance procedure of the contract or under the provisions of the Railway Labor Act" (Appendix A, p. 5a, *infra*). However, after the strike had been in progress for several days, the company granted the six employees a hearing on grievances which had been filed protesting their suspensions. The Opinion below summarized the termination of the strike as follows:

> "The strike lasted ten days. During that period the company representatives met with the union representatives, and at the meetings the union took the position that since the six suspended employees had been granted a hearing[3] and representation as provided by Section 22 of the contract, the purpose of the strike had been accomplished. The Union caused a notice to be delivered to the company which stated in part as follows: 'Due to the fact that the suspended employees were granted Union representation, the denial of which precipitated the above mentioned work stoppage, I have ordered all the employees to report to work at 8:00 A.M., Thursday, April 17, 1958.'
>
> "There was no written agreement in settlement of the strike, and there were no oral commitments by the company regarding the restoration to duty of all or any of them. The company merely stated that it would take each individual as he appeared and process his case. The union chose not to continue the strike until such time as any terms might be agreed upon, but ordered the men to report to the company, which they did. As the men appeared, the company processed them as applicants for employment in the same or near-identical

[3]The hearing referred to was the first step of a series of hearings that culminated in the award of Francis J. Robertson. (Pl. Ex. 1.) This award is also reproduced at pp. 10-36 of the Transcript of Record on file in the pending *Central* case. (No. 61.)

manner as it ordinarily processed an applicant for employment who had not theretofore been in an employer-employee relation with the company. The company adopted the position, which it was careful at all times to maintain, that when the strikers left and set up the picket line they had 'quit' their respective employments, and had themselves severed the employer-employee relationship existent immediately prior to the time they had gone on strike.

"The company restored some of the strikers to the same jobs at the same pay, some of them to jobs of a lower classification at reduced pay, but fifty-three were not re-employed at all. None of the strikers were ever served with notice of 'discharge' either orally or in writing. It is to be remembered that section 22 of the union contract provides that any 'discharge' from the employer-employee relationship must be by way of a service of notification in writing, and that subject thereto the individual dismissed has the right to apply for and receive an investigation and hearing." (Opinion, Appendix A, pp. 6a-7a.)

The Court of Appeals' Opinion holds the strike unlawful because it arose from a "minor dispute," and that in striking the union "elected to abandon recourse to the machinery afforded by the Act * * *" (p. 12a, *infra*). However, the Court did not retreat from, nor did it explain, its prior conclusion relating to the cause of the strike that

"* * * we are convinced that in view of the fact that the individuals were under discipline imposed by the company in view of their suspensions, they were entitled to refuse any interviews without benefit of the presence of an advisor if they so chose." (Appendix, p. 3a, *infra.*)

Nor did the Court comment directly on the result this denial of union representation would have had on the availability of

effective grievance machinery. Nor did the Court attach any significance to its prior finding that the company likewise did not seek relief "through any grievance procedure of the contract or under the provisions of the Railway Labor Act" (Appendix A, p. 5a, *infra*).

But the Court below did find, contrary to the contention of the respondent, that the fifty-three employees who were held out of service did not terminate their employment by the act of striking. It found that the congressional intent in the Railway Labor Act was

> "* * * that although an individual employee engages in collective action, as in a strike, his status continues to be that of an employee, even though the collective strike activity in which he has engaged may be illegal within the purport of the Act * * *
>
> "* * * each individual striking member of the union must be considered to have thereafter continued in his status as an employee. * * *"

The Court of Appeals, however, denied the union and the terminated employees the fruits of this conclusion, for two reasons.

It *first* found, contrary to the view of the trial court, that the union and the employees had abandoned available steps in the grievance procedure and thus were "without standing in the courts and the relief prayed for is foreclosed" (Appendix A, pp. 12a-13a, *infra*). In treating the System Board as an "available" step, the Court of Appeals simply assumed the existence of a firmly established system board of adjustment. We hasten to add, however, that this does not raise any issue of fact. The trial court, for example, acknowledged that "the

company refused to recognize the Board's authority in the matter" (Tr. 55). And the evidence is entirely undisputed that the carrier did refuse to recognize the Board's authority, in fact, it withdrew its two members from the Board and prevented the Board from functioning.

The undisputed evidence was that on July 2, 1958, the union submitted the cases to the Central-IAM System Board of Adjustment, which was composed of two company representatives and two union representatives. The cases remained pending, without the company members ever conceding a deadlock, until hearing before the four man Board was resumed on June 29, 1959, at which time the company board members made the following statement and withdrew from the proceedings:

> "Let the record reflect that in so far as the company members of the Board are concerned that if the Chairman persists in attempting to go forward with cases number 36 through 96, the company members of the Board have no alternative but to withdraw and have no participation therein." (S. F. 412-413, Pl. Ex. 4, pp. 24-25.)[4]

Thus, respondent, as to all grievances involved herein, either failed to establish, or disestablished, the System Board of Adjustment, and there was no such Board available to adjust and decide the dispute. What the Court of Appeals referred to as an abandonment of further *available* steps in the grievance procedure was in fact merely a recognition by the union that the carrier had refused to make the System Board available; hence, after two years of efforts to process

[4] A summary of the undisputed evidence relating to the union's efforts to obtain system board determination of these cases is contained in Appendix D hereto, p. 29a, *infra*.

the cases under the contract,[5] the union had no place to go except to the courts.

The *second* reason by which the Court of Appeals nullified the effect of its holding that the strikers' employment had not been terminated by the act of striking, was its conclusion, based on the finding that the strike was illegal,

> "* * * that as applied to the strikers, whose jobs were filled during the time they were voluntarily holding themselves out of service, their rights under the union contract should be considered to have been abrogated, at least to the extent of any seniority right to jobs filled by the new employees, when they resorted to a strike rather than to the grievance procedure of the contract." (Appendix A, pp. 13a-14a, *infra.*)

In addition to the foregoing, this case also involves the contracting out of bargaining unit work to maintenance contractors, a practice which was begun during the strike. The material facts are not in dispute (S. F. 275-283). The contract (Pl. Ex. 4-A) provided that the work was within "the scope of this Agreement." [Section 9(b) of contract]. For purposes of this petition, this issue is essentially the same as the issue involved in the withheld from service cases, for the Court of Appeals found

> "* * * this was a subject of grievance which was filed along with those relating to the fifty-three strikers and which was abandoned after once begun and carried through the majority of the 'steps' in grievance procedure prior to the filing of the suit. What we have already said relative to the binding effect of the election by the union and employees to proceed under grievance procedure would apply to this matter as well." (Appendix A, p. 16a, *infra.*)

[5]The Court of Appeals found that "the company delayed proceedings in every way and at every opportunity * * *." (Appendix A, p. 8a, *infra.*) pending *Central* case. (No. 61.)

This follows, because this grievance never reached deadlock either, for it was within the group of system board cases as to which respondent withdrew its board members (See Appendix D hereto, p. 29a).

The present action was brought in the state district court of Tarrant County on February 29, 1960.

Petitioner raised the federal question in the instant case initially in the trial court (Tr. pp. 2-17, S. F. 553). Respondent's defense set up the illegality of the strike under the Railway Labor Act (Tr. pp. 26-35, S. F. 11). The appeal to the Court of Appeals below, the motion for rehearing and the application for writ of error, all raised the federal question herein (Brief to Court of Appeals, Points 2, 3, 4, 5, 6, 7, and 12 in particular; Motion for Rehearing, points 8, 10, 11, 12, 18, 19, 20, 21, 22, 23, and 28 in particular; Application for Writ of Error, points 2, 3, 4, and 5 in particular). The Court of Appeals was mindful that it was construing a federal statute, for it noted that

> "The law of the case is provided in the Railway Labor Act—Carriers by Air, U.S.C.A. Title 45 'Railroads,' Ch. 8, Secs. 151-188." (Appendix A, p. 9a, *infra.*)

REASONS FOR GRANTING THE WRIT

1. The doctrine of the *unfair labor practice strike* is firmly established and recognized under the National Labor Relations Act, and this Court in *Mastro Plastics Corp. v. N.L.R.B., 350 U. S. 270, 100 L. Ed. 309, 76 S. Ct. 349,* addressed itself to the related question:

> "Does the collective bargaining contract waive the employees' right to strike against the unfair labor practices committed by their employers?"

The Court responded that there was nothing in the contract in issue, notwithstanding the existence of a no-strike clause,[6] which waived the employees' right to strike solely against the unfair labor practices of their employers. *350 U. S. 270, 284.* See also *N.L.R.B. v. Wagner Iron Works, 220 F. 2d 126.*

The instant case poses essentially the same question under the Railway Labor Act. Borrowing Taft-Hartley phraseology, the strike involved in this case was an unfair labor practice strike—for its purpose, as found by the courts below, was to obtain union representation at a disciplinary hearing for six employees whom the company had suspended. The strike protested the employer's refusal to recognize and treat with the certified representative of its employees, in violation of Section 2, First, Second, Third, Fourth, and the general purpose clause of Section 2 of the Railway Labor Act.

The courts and the National Labor Relations Board have generally maintained a parallel interpretation as to the duty to bargain under both the Railway Labor Act and the Labor Management Relations Act of 1947, as amended. *Elgin, Joliet and Eastern Railway v. Burley, 325 U. S. 711, 89 L. Ed. 1886, 65 S. Ct. 1282; Railroad Telegraphers v. Chicago & N.W.R. Co., 362 U. S. 330, 4 L. Ed. 2d 774, 80 S. Ct. 761; Bethlehem Steel Co., 89 N.L.R.B. 341, 25 LRRM 1564; Town & Country Mfg. Co., Inc., 136 N.L.R.B. No. 111, 49 LRRM 1918; Railway Clerks v. Atlantic Coast Line R. Co.,*

[6]The Central-IAM contract did not contain a no-strike clause, to which fact petitioner attaches no special significance except in so far as it indicates the intent of the parties to limit their grievance procedure to contractual disputes. The instant dispute which precipitated the strike, however, was over the carrier's refusal to follow the grievance procedure, and that specific dispute was never the subject of a formal grievance by either the union or the carrier.

201 F. 2d 36, Cert. den. 355 U. S. 992, 73 S. Ct. 1131. In *Steele v. Louisville & N.R. Co., 323 U. S. 192, 200, 89 L. Ed. 173, 65 S. Ct. 226,* this Court referred to the duty to bargain under the two statutes as "like provisions."

It has long been recognized that bargaining under both statutes means more than merely periodically negotiating collective bargaining contracts. It also means treating exclusively with the union representative as to bargainable matters and not dealing individually or settling grievances directly with employees except in the limited manner provided by express statutory provision. Respondent's refusal to permit union representation herein would patently have been a violation of Sections 8(a)(1) and 8(a)(5) of the Labor Management Relations Act, had that statute been applicable, and in fact it was a violation of the comparable provisions, *supra*, of the Railway Labor Act. *Bethlehem Steel Co., supra; Gagnon Plating and Mfg. Co., 103 NLRB 263, 269; E. I. Dupont De Nemours & Co., 115 NLRB 84, 96.* Cf. footnote 35 in *Elgin, Joliet and Eastern Ry. v. Burley, supra, 325 U. S. 711, 737.*

By granting certiorari herein, the Court will have an opportunity to determine whether the parallel duties under the two statutes require parallel treatment of the right to strike against an employer's violation of its statutory duty to bargain and deal with the representative of its employees.

The traditional concept of "major" and "minor" disputes has adequately served to describe most Railway Labor Act disputes and strikes spawned by such disputes;[7] however,

[7] *Elgin, Joliet and Eastern Ry. v. Burley, supra; Brotherhood of R. R. T. v. Chicago River & I. R. Co., 353 U. S. 30, 1 L. Ed. 2d 622, 77 S. Ct. 635.*

that concept has not been sufficiently flexible to encompass all types of disputes and strikes which have occurred under the Act. For example, the concept pre-supposes the existence of a grievance procedure available to either party and capable of making a final and binding determination as to the construction, interpretation, and application of existing contracts. But the instant case illustrates that in the airline industry, where there is no National Board of Adjustment, recourse must generally be had to separate system boards of adjustment, which may or may not be available, depending on the cooperation of both parties. Furthermore, the strike in the instant case was actually caused by the employer's refusal to comply with the contractual grievance procedure. Ultimately the employer refused to join with the union to compose a system board which could have settled the case now before this court, and this employer also refused to comply with the same System Board Award to which it has pointed as proof that system board relief was available if the employees were aggrieved by the denial of union representation.[8]

Although the precise question posed herein is one of first impression in this Court, several United States Courts of Appeals and this Court have passed on questions related in principle, but the Opinion of the Court below runs counter to the principle underlying such cases. The Courts have refused to permit injunctions, under the mandate of the Norris-LaGuardia Act, as to certain strikes where the causal dispute either could not be classified simply as "major" or

[8]The Robertson award involved in the pending *Central* case No. 61.

"minor", or where the classification of "minor dispute" did not, *ipso facto*, provide legal basis for declaring the strike enjoinable or unlawful.

Manion v. Kansas City Terminal Railway, 353 U. S. 927, 1 L. Ed. 2d 722, 77 S. Ct. 706, indicated that a carrier would not be entitled to an injunction against a strike during the term of a contract unless the subject matter of what would otherwise be a minor dispute is pending before the appropriate Board of Adjustment, or at least, efforts have been made to bring such dispute before such Board. In remanding *Manion* "without prejudice to the power of the Court of Appeals to reinstate its judgment if the dispute is submitted to the Adjustment Board by *either* party within a reasonable time,"[9] was the Court not placing a significant caveat on the *Chicago River* (*supra*, footnote 7) doctrine? It would appear that if the complaining party has ignored the adjustment board machinery *Chicago River* does not apply and the proscription of Norris-LaGuardia remains effective, which was the interpretation which the Seventh Circuit gave the *Manion* case,

> "* * * that a court should not permit the use of its injunctive powers in cases involving minor disputes where such disputes could have been submitted to the Adjustment Board." *Hilbert v. Penn. R.R. Co., 290 F. 2d 811, 885-886.*

Confusion in terms is perhaps inevitable in certain cases where attempt has been made to squeeze the dispute into either a "major" or "minor" slot. Illustrative are two significant decisions of the Ninth and Second Circuits, where

[9]Emphasis added.

the courts in essence recognized that a strike under the Railway Labor Act may be protected in the same manner as under the Taft-Hartley Act. Of course, the phrase "unfair labor practice strike" has not been used, but the judicial result appears to be the same.

The Ninth Circuit, in *Butte, Anaconda & P. Ry. Co. v. Locomotive Firemen, 268 F. 2d 54*, denied use of an injunction against a strike where it found that the carrier

> "* * * does not seek an injunction to compel utilization of Railway Labor Act procedures. Rather it wants to enjoin employees from resorting to selfhelp after appellant itself (through Anaconda) abandoned those procedures."

This case is an example of the privileged use of a strike, provoked by a carrier, even when other avenues of relief might have been open to the union.[10]

And more recently, a Second Circuit majority held in *Rutland Railway v. Locomotive Engineers, F. 2d , 50 LRRM 2535 (Petition for Certiorari filed Aug. 28, 1962, No. 380, Oct. 1962 Term)*, after characterizing the dispute as "minor" that if in fact the carrier "has failed to take the steps required of it by the Railway Labor Act, it is not entitled to injunctive relief against the strike of its employees."

And in *Northwest Airlines v. Transport Workers, 190 F. Supp. 495 (42 CCH Lab. Cases ¶16,764)*, a District Court came close to using Taft-Hartley concepts when it refused an injunction where an airline's navigators were honoring the

[10]The Court also stated, citing the *Manion* case, that because of employer's failure to submit the dispute to the Adjustment Board, even if the dispute had been "minor," Section 8 of Norris-LaGuardia Act would have barred an injunction.

picket line of another union. The Court found this to be "a concerted refusal to work, actively encouraged and directed by the officers of the local union and the international," but not a "minor" labor dispute. Cf. *Boeing Airplane Co. v. Machinists, 188 F. 2d 356, cert. den. 342 U. S. 821.*

The policy expressed in the foregoing cases follows the direction laid down by this Court in *Brotherhood of R.R. Trainmen v. Toledo P. & W. R.R., 321 U. S. 50, 88 L. Ed. 534, 64 S. Ct. 413,* in which Section 8 of the Norris-La Guardia Act was held to deny injunctive relief against a strike where a carrier had omitted the step of arbitration and thus failed to make "every reasonable effort" to settle the dispute. Otherwise, injunction would have been available. The Court there announced that

> "The policy of the Railway Labor Act was to encourage use of the non-judicial process of negotiation, mediation and arbitration for the adjustment of labor disputes." *321 U. S. 50, 63.*

The same policy, applied to the instant case, would require reversal of the Court below, on grounds that by denying union representation at the grievance hearing, the carrier violated the statute. The carrier's hands were not clean. A strike to enforce the statutory duty should not have been classified as a "minor dispute" or if so classified, the carrier's failure to use grievance procedures and to make such procedures available to the union ought to have prevented a finding that the strike was illegal. And if the strike was not illegal, the employer's constructive discharge of the strikers, which occurred at the beginning of the strike and before

replacements were hired, should have been found unlawful and in violation of the contract and the Act.

The Court below erred in holding that the employees, by their act of striking, lost their rights under the union contract "at least to the extent of any seniority right to jobs filled by the new employees * * *." Query, if the contract remains in effect, as it did here, may the employer ignore the contractual procedures for terminating seniority for "just cause" only? This question affects not only employees under the Railway Labor Act, but substantially all employees under collective bargaining. The decision below runs counter to established contract law, that where a party fails to rescind a contract in response to a material breach—such as a strike in violation of the contract—he is bound to follow the contract as to his remedies. This principle has been applied under the Railway Labor Act, though of necessity generally by system boards of adjustment and Presidential Emergency Boards. *Boeing Airplane Co. v. Machinists, 188 F. 2d 356 affirming 91 F. Supp. 596, cert. den. 342 U. S. 821, 96 L. Ed. 629; Trans World Airlines, Inc., 24 LA 95; Presidential Emergency Board, No. 62.* Such cases indicate that even as to illegal strikes, the contractual procedure for discharge must be followed, otherwise the discharged strikers are entitled to reinstatement. Such a result is consistent with the procedural due process which a contractual grievance procedure attempts to achieve. In view of the strong public interest in labor disputes affecting transportation, especially those in the airline industry, this issue is a proper one for this Court.

This case raises the further question, should the withheld from service employees have been treated the same as unfair labor practice strikers and returned to their jobs notwithstanding that replacements had been hired? The rule is clear under the Taft-Hartley Act. *N.L.R.B. v. U. S. Cold Storage, 203 F. 2d 924; Modern Motors, Inc., 96 NLRB 964.* Petitioner contends the rule should be the same under the Railway Labor Act, and the strikers should have been reinstated and made whole as to their losses from the date the strike ended, at which time they had made an unconditional offer to return to work.

2. The second question raised by this petition is whether a carrier violates the Railway Labor Act when it withdraws its members from a system board of adjustment, thereby preventing a deadlock and the appointment of a neutral. In view of the similarity between system board hearings in the airline industry and arbitration proceedings generally, the principles enunciated in the *Steelworkers trilogy*[11] ought to be applicable. If not, judicial elucidation as to the differences will be of immeasurable benefit to the parties who must deal with the arbitrable process in the airline industry through system boards. The *Chicago River* case, *supra*, breathed life into and gave definition to the grievance settlement process under the Railway Labor Act, but the subject there defined was the statutory National Railway Adjustment Board, over which a single party had no control. There is now need for similar attention to the system board process

[11] *United Steelworkers v. American Mfg. Co., 363 U. S. 564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343; United Steelworkers v. Warrior & G. Nav. Co., 363 U. S. 574, 4 L. Ed. 1409, 80 S. Ct. 1347; United Steelworkers v. Enterprise Corp., 363 U. S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358.*

as it affects the airline industry, for if a carrier can frustrate system board determination by withdrawing from the board, then certainly the *Chicago River* doctrine, which allows injunction against minor dispute strikes because of availability of meaningful adjustment board remedies, will have been placed in jeopardy. No citation of authority is required to demonstrate the frequency with which United States District Courts have issued injunctions against airline strikes in recent years, which injunctions have been based on the *Chicago River* doctrine. Certainly it is reasonable to expect that the system board remedy be both available and effective if unions are to be required to give up their right to strike, for the language of the Railway Labor Act itself exacts no such drastic penalty directly. If the decision below is not reviewed and set aside, it will stand as an open invitation to any airline employer desiring to sidestep the employees' representative and make a mockery of the system board procedures. Such a result can only destroy the basic scheme of the Railway Labor Act insofar as it affects the airline industry.

Section 204 of the Act makes it the duty of the carrier and the representative *to establish* the board of adjustment. It seems basic, therefore, that when the company members walked out of the hearing room on June 29, 1959, and announced their withdrawal from all further participation and thereby prevented a deadlock and appointment of a neutral, respondent was *disestablishing* the Board for purposes of the instant grievances.

3. The final reason for granting the writ is perhaps already implicit in what has previously been stated. Fifty-three employees have been denied their jobs and others have suffered economic hardship. The union's collective bargaining position has been obviously impaired. The relief which this Court has power to grant in the companion *Central* case, now pending, cannot be complete as to the basic dispute unless this case is also reviewed. Both cases arise from common events and if meaningful judicial review is to be achieved, both should be passed on by this Court.

CONCLUSION

Based on the foregoing reasons, writ of certiorari should be granted, for the State Court has erred substantially in the interpretation of a federal statute. Upon review, the decision of the Court below should be reversed and remanded for ascertainment of damages by the trial court.[12]

Respectfully submitted,

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October 6, 1962

[12] Pursuant to stipulation of the parties (Tr. 42).

APPENDIX A

Opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas

No. 16297

From the District Court of Tarrant County

Plaintiff union and numerous individuals brought suit against the defendant airline company for damages accrued as the result of their wrongful discharge from an employer-employee relationship, formerly existent between the individuals and the company, in breach of union contract existing at the date of discharge, for a writ of injunction which would restore the individuals to their former jobs and for general relief. Additional complaint, by the union in behalf of all employees of the company represented by it, was because of the company's practice, begun on and after the date claimed as that of the individuals' wrongful discharge, of contracting out maintenance work on its aircraft. Such work had formerly been performed by the company on its own premises by its own employees.

Trial was before the court without intervention of a jury, and judgment was rendered against the individuals and the union and in behalf of the company. No findings of fact or conclusions of law were requested or filed. An appeal was taken to this court.

Judgment affirmed.

The individuals bringing the suit had been among that category of employees of the company represented by the union under a contract in effect between the union and the company on date of April 7, 1958. On said date the union called a strike, in which all of said individuals participated, because of certain mistreatment the union believed the company had afforded six of its employees (not the individuals considered in this suit) growing out of said employees' refusal to work overtime on one of its aircraft.

It would be well to understand the affair of the six employees in question, so we will attempt to briefly state it.

On April 4 and 5, 1958, the six employees were served by the company with written notice that they were each "suspended from service" and instructed to present themselves at 8:00 o'clock on the morning of April 7, 1958, at the office of the company's director of maintenance. The company, through its said director, intended to question the employees concerning their reasons for refusing to work overtime on the aircraft. The employees appeared on the company premises as requested, though they were not on the payroll of the company in view of their "suspensions". Union representatives, one a co-employee of the men appearing and one not an employee, presented themselves along with those the company had directed to appear. The company insisted that it was entitled to talk to the men individually and privately. The men and the union representatives insisted that the company did not have the right to do so. There was a refusal on their part that any such interview be held. While it was not de-

fined as such, we believe that the union was contending that what the company desired amounted to a "step" in the grievance procedure of the contract between the company and the union, while the company was contending that it did not amount to such a "step". Be that as it may, we are convinced that in view of the fact that the individuals were under discipline imposed by the company in view of their suspensions, they were entitled to refuse any interviews without benefit of the presence of an advisor if they so chose. They did so choose, and the company would not accede, whereupon they left the premises.

Section 22, entitled "Investigation and Discipline", is the part of the contract which was in effect between the company and the union which the union believed to have been invoked by the company, and which the company did not consider to have application. Material portions thereof read as follows: "(a) Hearing. 1. An employee shall not be disciplined or dismissed from the service of the Company without notification in writing of such action. An employee who is disciplined or dismissed shall be entitled to an investigation and hearing thereon, provided that such employee makes written request for such investigation and hearing within seven (7) days after receiving such notification. 2. An employee may be held out of service by the Company pending such investigation and hearing and appeals therefrom * * *. 4. Prio. to such investigation and hearing, such employee shall be notified in writing by the Company of the precise charge or charges against him. He shall be given the necessary time, not exceeding seven (7) days, in which to secure the presence

of witnesses and shall have the right to be represented by the employee of the Company of his choice or by his duly accredited representative or representatives. 5. Such investigation and hearing shall be held by a maintenance supervisor of the Company, designated by the Company for that purpose, and shall be held within seven (7) days after the receipt of the employee's written request therefor." Further provisions prescribe time schedules within which decisions are to be rendered, and for appellate steps and decisions and forms thereof through the company and thence before the Central Airlines, Inc. Mechanics' System Board of Adjustment.

As a matter of information, it is to be noted that each of the six individual employees, after the events heretofore mentioned, filed their written request for an investigation and hearing under the provisions of Section 22 (a) 1 of the aforesaid contract. These were honored and processed by the company in accordance with the other provisions of said section.

The union and other employees of the company did not wait until the individual employees filed such written request for investigation and hearing. Obviously they were incensed at the attitude of the company and its representatives on the morning of April 7th. A union meeting was called for a time later in the day at which the majority present proceeded erroneously upon the supposition that the company had breached the provisions of the union contract by refusing to proceed with the interview it had requested of the suspended individuals in and with the presence of one or more representatives of the union. Although it should have been clear to anyone with the slightest legal training that the

company had not breached the contract, the union and its membership certainly in the best of faith, reached a conclusion to the contrary. By wire the following notice was prepared and served upon the company, "* * * your failure to comply with section 22 which calls for the presence of a union representative in a suspension hearing involving * * * (is) such a material breach of the agreement that we have no alternative but to exercise the rights reserved for us in engaging in concerted action to protest the agreements from such continuing violations the above mentioned employees as well as those engaging in concerted action are ready, willing and able to comply with section 7 of the agreement which does not call for forced overtime employment. Your attempt to impliedly write into the contract a forced overtime provision is in strict violation of section seven of the agreement."

A strike was called and the great majority of the union employees failed to present themselves for work on the following day, April 8, 1958. The union put out a picket line at the company's plant. It was not honored by the members of other unions. The company publicized the fact that it was taking applications to fill the strikers' jobs and began hiring new employees as permanent replacements. The company also negotiated contracts with private contractors for work to be done away from its premises.

Neither the company nor the union sought any relief through the machinery of the courts, or through any grievance procedure of the contract or under the provisions of the Railway Labor Act. As previously indicated, a request for

hearing was filed by or in behalf of the six suspended employees, and the company was careful to proceed thereupon in strict compliance with the provisions of the union contract. At all times the company treated the contract as one continuing in effect.

The strike lasted ten days. During that period the company representatives met with the union representatives, and at the meetings the union took the position that since the six suspended employees had been granted a hearing and representation as provided by Section 22 of the contract, the purpose of the strike had been accomplished. The union caused a notice to be delivered to the company which stated in part as follows: "Due to the fact that the suspended employees were granted Union representation, the denial of which precipitated the above mentioned work stoppage, I have ordered all the employees to report to work at 8:00 A.M., Thursday, April 17, 1958."

There was no written agreement in settlement of the strike, and there were no oral commitments by the company regarding the restoration to duty of all or any of them. The company merely stated that it would take each individual as he appeared and process his case. The union chose not to continue the strike until such time as any terms might be agreed upon, but ordered the men to report to the company, which they did. As the men appeared, the company processed them as applicants for employment in the same or near-identical manner as it ordinarily processed an applicant for employment who had not theretofore been in an employer-employee

relation with the company. The company adopted the position, which it was careful at all times to maintain, that when the strikers left and set up the picket line they had "quit" their respective employments, and had themselves severed the employer-employee relationship existent immediately prior to the time they had gone on strike.

The company restored some of the strikers to the same jobs at the same pay, some of them to jobs of a lower classification at reduced pay, but fifty-three were not re-employed at all. None of the strikers were ever served with notice of "discharge" either orally or in writing. It is to be remembered that section 22 of the union contract provides that any "discharge" from the employer-employee relationship must be by way of a service of notification in writing, and that subject thereto the individual dismissed has the right to apply for and receive an investigation and hearing.

Not being restored to service at any work whatever, the fifty-three aforementioned individuals did file, within seven (7) days, grievance forms in which substantially the following uniform statement was made: "I have been unjustly held out of service since I reported for it at 8 A.M. on Thursday, April 17, 1958. In accordance with Section 22 of the current I. A. of M.—Central Airlines, Inc. Agreement, I request that I be reinstated without loss of seniority rights and that I be paid for all loss of pay involved." Albeit contesting at every step the right of any of the fifty-three to be heard and considered as a person entitled to the procedure afforded by section 22 of the contract, the company honored the "steps" for grievance procedure set forth thereunder, in

so far as any "step" required action by anyone within the company's power to furnish or control. Admittedly the company delayed proceedings in every way and at every opportunity, being careful to barely "skate inside" the boundaries beyond which it would be safe for it to go without jeopardy to its avowed contentions.

Despite attendant delays the grievances were processed step-by-step up until they reached the point where the union (and the individuals) petitioned the National Mediation Board for a neutral referee to make a decision in the case. Such was a "step" in grievance procedure preliminary to any finality of decision under the provisions of the contract and the Railway Labor Act. At no point did the company so act or refuse to act as to block orderly processing of the cases, and indeed to do so would not be within its power, albeit, as already mentioned, it delayed matters when it could and it at all times contested the right of jurisdiction of those provided and/or required to make determinations—under the theory that the employer-employee relationship which had formerly existed between it and the strikers was voluntarily severed by the employees themselves as the result of their unilateral unlawful strike action. After having petitioned for a neutral referee the union (and the individuals) withdrew application therefor (and for further action under grievance procedure). The suit in district court was filed.

At all times prior to filing the suit the contention of the union and the individuals was that the employer-employee relationship between the company and the individuals per-

sisted up until the time any further grievance procedure was authorized and permissible as applied to the matter upon which grievance was filed, and that the individuals were merely "out of service", and wrongfully held in such state of suspension by the company. In filing the suit, on February 29, 1960, they apparently accepted the contention of the company that the employer-employee relationship was in fact severed, at least as of the date of April 17, 1958, when they appeared and presented themselves as available to perform the duties of their employment. Thus they attempted, by agreement to be implied, to yield in their first contentions upon being "held out of service" and to narrow the issue to a question of whether the severance of the employer-employee relationship was the fault of the company in that it wrongfully "discharged" them, or whether it was their own fault in that they "quit" their employment relation. We entertain considerable doubt, under the circumstances, of the propriety of either party's attempt to retroactively fix the men's status as one in which the employer-employee relationship did not exist.

Despite the fact that the union and the strikers ultimately offered to agree and concede that the employer-employee relationship was terminated in April of 1958, we believe it would be wise to examine the state of the law.

The law of the case is provided in the Railway Labor Act—Carriers by Air, U.S.C.A. Title 45 "Railroads", ch. 8, Secs. 151-188.

Under the Act it is provided in both section 152 and section 159 that nothing contained in the Act shall be construed to make the quitting of his labor or service by an individual employee an illegal act. To us the meaning of this encompasses the congressional intent that although an individual employee engages in collective action, as in a strike, his status continues to be that of an employee, even though the collective strike activity in which he has engaged may be illegal within the purport of the Act. Furthermore, it means that no such individual employee may be treated and considered as having quit his employment, or as having severed his relation to his employer as an employee, but conversely must be treated and considered as having ceased from his labor or having held himself "out of service" on a temporary basis. A like distinction was recognized by the Supreme Court of Texas in the case of International Union of Operating Engineers v. Cox, 1949, 148 Tex. 42, 219 S. W. 2d 787. In view thereof it would appear that it would only be in instances of discharge, acknowledged as such, that a period could be considered to have begun for which damages could be sought under the theory that the discharge was wrongful.

By striking it may be that an individual employee may abrogate certain of his rights under the contract to which he is privy as a member of a union which negotiated it, but, in view of the Act, his right to have his status as an employee would in every case persist and would not be totally altered solely on account of the fact that he had engaged in a strike, regardless of its legality or illegality. If he be discharged because he was or had been a striker he would be entitled to

elect as to whether he preferred to file a grievance subject to appeal to the ultimate appellate body constituted within the contemplation of the Railway Labor Act in seeking reinstatement, plus damages perhaps,—or preferred to honor and accept the discharge and sue for immediate relief in the form of damages.

Under the circumstances of this case we are of the opinion that because of the fact that the collective strike action was contrary to the intent and purpose of the Railway Labor Act, and therefore unlawful, yet, for purposes of the Act, each individual striking member of the union must be considered to have thereafter continued in his status as an employee, albeit one who has voluntarily held himself "out of service", for none of them quit or were discharged from the "employee" status.

Consideration may well be given to a determination of whether the case before us has grown out of a labor dispute properly characterized as a "minor dispute", enjoinable by the courts, or as a "major dispute", not subject to injunction. Referring to the case of Elgin, J. & E. R. Co. v. Burley, 1945, 325 U. S. 711, at page 723, 65 S. Ct. 1282, at page 1290, 89 L. Ed. 1886, and considering the nature of the dispute over which the union called the strike, it is readily determined that the strike arose over a "minor dispute", i. e., at most one in which the union and its membership contended for interpretation or enforcement of contractual rights previously agreed upon, rather than to create any new contractual right.

Under the present state of the law applicable to the transport industries a strike called over a "minor dispute" between management and labor may be enjoined to prevent a tie-up of transportation facilities. The primary purpose of the Railway Labor Act is to avoid interruption of commerce by providing for orderly, peaceful settlement of such disputes, which form of settlement is by the Act made the duty of both labor and management, in Sec. 152 and 184 under procedure prescribed and made enforceable under provisions of these sections and Secs. 153, 155 and 185.

It is obvious from the circumstances of this case that the union, in calling the strike, elected to abandon recourse to the machinery afforded by the Act and to penalize the company by economic coercion. The company elected to refrain from seeking to combat the union's strike activity through injunctive procedure, but instead sought to accommodate itself to the condition confronting it by allaying its problems in hiring new employees and contracting out certain of the work it had formerly handled.

Conceding arguendo, that the strikers who were not returned to work were and continued to be its employees, and that its relation to them was as employer to employee, regulated by the provisions of the union contract, the company asserts as binding upon them their presentation of their grievances through procedure afforded under the contract itself and under the Railway Labor Act. Ergo, says the company, since the last decision under the grievance procedure was against the contentions of the union and the strikers who were not returned to service, and since they abandoned

further available "steps" in the grievance procedure, such last decision had become final and they are without standing in the courts and the relief prayed for is foreclosed.

In connection with such contention of the company we are of the opinion that it is correct and should be sustained and that the cause of action of the union and the individuals might have been properly dismissed. Sarran v. Missouri Pacific Railroad Company, 1959 (Tex. Civ. App., San Antonio), 330 S. W. 2d 925, error refused; Union Pacific R. Co. v. Price, 1959, 360 U. S. 601, 79 S. Ct. 1351, 1355, 3 L. Ed. 2d 1460.

Except for the fact that we believe the proper order in the trial court might have been dismissal of the cause had the company moved for a dismissal, the judgment should be one affirming the denial of relief for the same reasons.

Assuming there would be no question of propriety for this court to consider that it possessed the right to act in all respects rather than merely upon the right to damages, it would seem that if we could, and were to sustain the union and the strikers who were not reinstated in service—would oust from their jobs those new employees who went to work for the company while the illegal strike was in progress. We believe that as applied to the strikers, whose jobs were filled during the time they were voluntarily holding themselves out of service, their rights under the union contract should be considered to have been abrogated, at least to the extent of any seniority right to jobs filled by the new employees, when they resorted to a strike rather than to the grievance proce-

dure of the contract. Indeed, it appears that the newly hired employees came under the jurisdiction of the union contract upon their employment by the company, or at least shortly thereafter, and their own rights would be those specified by the same contract. It is to be noticed that the company never at any time treated the contract as having been wholly abrogated, and even during the progress of the strike proceeded to honor its processes for the handling of the grievances of the six suspended employees as to whom the dispute arose culminating in the strike.

Since the Act requires the strikers to be individually considered, we may hypothesize the situation as follows: No. 1 employee refuses to perform the service for which he is employed by the company and holds himself "out of service" pending satisfaction demanded of the company. While the situation persists No. 2 applicant, presents himself for employment and certifies himself ready to perform the job in question, and the company enters into the employer-employee relationship with him and he begins to perform service on the job from which No. 1 absented himself. Should No. 1 present himself to the company and certify his readiness to resume the duties of his employment on such job, withdrawing his previous demands, is the company in duty bound to restore him to the job despite the fact that to do so would require it to hold No. 2 "out of service"?

We think not. If the company were so required, No. 1 would be afforded the opportunity to continue on the job until he was assured that the services of No. 2 were no longer available to the company, whereupon he could again hold him-

self absent as "out of service" until the company met the same demands, once withdrawn but now reasserted. By this means would be placed within the power of No. 1 all the weapons of economic coercion, while at the same time the company would be deprived of all rights to maintain itself as applied to the job which should be performed if its commerce is to continue within the contemplation of the Railway Labor Act. Of necessity it would appear that principles of equity would have application, the exigencies of which would warrant the company in continuing the period as to which No. 1 was "out of service" so long as the job is filled by No. 2 in the satisfactory rendition of service. This would have special application to an instance where there was no specific provision of the contract under which employment was conducted which would require the discharge or holding "out of service" of the employee who would be in the position of No. 2 in the situation hypothesized. There is no such specific provision in the contract considered in the instant case.

Of course nothing hereinabove stated should be construed to have any application or effect in any instance of a general strike where, pursuant to a new contract or agreement made in settlement thereof, agreements are entered into which would fix employment rights and seniority as between those who had engaged in the strike and those who were newly employed during the period of the strike.

As applied to that part of the contention which relates to the work being contracted out by the company to maintenance contractors on premises away from those of the com-

pany, we take occasion to note that the contract upon which the contention is asserted has no application to work performed on premises other than that of the company, save and except work performed elsewhere by the company's own employees. Furthermore, this was a subject of grievance which was filed along with those relating to the fifty-three strikers and which was abandoned after once begun and carried through the majority of the "steps" in grievance procedure prior to the filing of the suit. What we have already said relative to the binding effect of the election by the union and employees to proceed under grievance procedure would apply to this matter as well.

We have heretofore mentioned that the company at all times refused to recognize and consent that there would be any jurisdiction of the cases filed under the grievance procedure in the various boards and bodies, prescribed by the contract and by the Act to consider grievances. There is a point of error grounded in the contention that the trial court erred in failing and refusing to find that the company violated the contract by such refusal.

This matter is not material. The Company's act could be no more than a challenge of jurisdiction. Just as in instances of litigation in the courts jurisdiction may be attacked as to the persons or as to the subject matter and the challenge so presented sustained or denied. Even when it is ultimately determined that the challenge is groundless, he who made the challenge has lost nothing to which he was entitled, although conceivably he might have failed to gain something to which

he would have been entitled had he claimed it. He is certainly not estopped to make his other defenses. Jurisdiction, if it exists, is not impaired by a contention that it does not exist, and one who successfully resists a contention that jurisdiction does not exist gains nothing except a ruling which sustains the jurisdiction.

It will be obvious to counsel for the litigants on this appeal that in some instances the points of error have been sustained, and in other instances they have been overruled. In no instance, however, would the effect of sustaining a point be to establish any error which would require a reversal of the judgment of the trial court.

Judgment is affirmed.

Frank A. Massey
Chief Justice

Feb. 23, 1962

CONCURRING OPINION

I concur in the affirmance of the judgment.

Thomas J. Renfro,
Associate Justice.

Feb. 23, 1962

APPENDIX B

Order of Supreme Court of Texas
Refusing Petition for Writ of Error

IN THE SUPREME COURT OF TEXAS

No. A-9035 July 11, 1962

International Association of Machinists et al.
vs.
Central Airlines, Inc.

From Tarrant County, Second District.

Application of petitioners for writ of error to the Court of Civil Appeals for the Second Supreme Judicial District having been duly considered by the Court, and the Court having determined that same presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused. It is further ordered that the applicants, International Association of Machinists et al. (named as appellants in the judgment of the Court of Civil Appeals), and their sureties, Otto B. Mullinax and C. W. Dixie, pay all costs incurred on this application.

—0—

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order entered by the Supreme Court of Texas on application for writ of error as numbered

and styled above, as the same appears in the minutes of said Court on July 11, 1962.

WITNESS may hand and the seal of the Supreme Court of Texas, at the City of Austin, on this, the 2nd day of August, 1962.

GEO. H. TEMPLIN, CLERK
By /s/ Jewell Seeliger
Mrs. Jewell Seeliger, Deputy

APPENDIX C

The relevant provisions of the Railway Labor Act (44 Stat. L. 577, as amended; 45 U.S.C. §§151-163, 181-188) are as follows:

"TITLE I

"*Section 1.* When used in this Act and for the purposes of this Act—

* * *

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

* * *

"*Sec. 2.* The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any

interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or

to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * *

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

* * *

"Sec. 3.

"First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board'

* * *

* * *

"Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

* * *

"*Sec. 6.* Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after the termination of conferences without request for or proffer of the services of the Mediation Board.

"TITLE II

"*Sec. 201.* All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

"*Sec. 202.* The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee,' respectively, in section 1 thereof.

* * *

"*Sec. 204.* The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

"It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish

a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I of this Act.

"Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarily limited jurisdiction."

The relevant provisions of the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 29 U.S.C. §141 et seq) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"Sec. 8.

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

"Sec. 9.

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment."

The relevant provision of the Norris-La Guardia Act (47 Stat. 70, 29 U.S.C. §§ 101-115) are as follows:

"Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to

decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

* * *

"Sec. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

APPENDIX D

Summary of evidence relating to exhaustion of System Board remedy.

There were two series of cases which the union was seeking to have processed. The first involved the six suspended employees (herein, No. 61, Oct. Term, 1962), and the second, frequently called the "withheld from service cases," involved the grievance cases in the instant petition for certiorari. The contact required that a "deadlock" exist before a case would be referable to a neutral.* The company refused to submit both sets of cases to the same neutral, insisting that no deadlock had yet occurred in the withheld from service cases (Plaintiff's Ex. 4-C, U-36, letter of October 24, 1958). The National Mediation Board, which appoints the neutral, advised that the neutral would hear only cases which both parties agreed were properly before the system board. Therefore, the union, on November 7, 1958 (Plaintiff's Ex. 10), wrote the Mediation Board as follows:

> "With respect to the 'held out of service' cases covered by my letter of September 23, *Mr. Howe takes the position that there is no existing deadlock in the System Board and that therefore the request for a neutral is not properly presented at this time.* Mr. Howe concludes his letter by stating that Central Airlines is agreeable to having Mr. Robertson act as a neutral on the suspension and discharge cases which are recognized by the carrier as deadlock disputes.

*The System Board agreement does not provide for any time limit in which the union and company Board members shall complete consideration of the case. Paragraph M of the Agreement (p. 43 of the contract) simply provides that if the Board fails to reach a decision it shall endeavor to agree within 30 days upon a procedure for breaking such a deadlock. The *30-day provision does not begin to run until deadlock has occurred.* (Pl. Ex. 4-A.)

"In the interests of avoiding confusion in the record before the Mediation Board and the neutral referee and eliminating as much as possible unnecessary disagreement between the parties on procedure, and as suggested by your letter of October 30 to Mr. Howe, a copy of which was sent to me, *I am at this time withdrawing the request contained in my letter of September 23 for the appointment of a neutral to resolve the 'held out of service' disputes without waiving any right of the International Association of Machinists to later request the appointment of a neutral* and with the hope that this disagreement between the Machinists and Central Airlines on the further processing of these cases may be amicably resolved by them." (Emphasis added.)

The parties then made arrangements for the hearing and held the hearing in the cases involving the six suspended employees (S. F. 382-417), and *agreed*, according to undisputed testimony (S. F. 406-408), that they would take up the instant cases after neutral Robertson completed the other hearing. It was not until several months later, specifically on June 24, 1959, that the company indicated for the first time that it would refuse to process the instant cases before the system board (Plaintiff's Ex. 4C, U-44, S. F. 409-410). *Up to that time it had maintained that no deadlock existed* because the union had not completed presentation of its case, and that the board would "recess indefinitely" until certain *live* rather than *written* evidence was introduced. (Statement of F. E. Howe at July 3, 1958, hearing.) Relying on that statement, the union attempted to meet the company's objections, only to learn—long after it had temporarily withdrawn its request for a neutral but reserving its rights—that the company had reversed its position and was refusing

to participate further. A hearing was called for June 29, 1959, at which time the company Board members "walked out". (Pl. Ex. 4, pp. 24-25.) The union members of the system board finally attempted to obtain an executive session to declare a deadlock, but the company members failed to show up (S. F. 412-413). It was undisputed that the deadlock was impossible without company participation (S. F. 417) and the National Mediation Board would not appoint a neutral without agreement of the parties (Plaintiff's Ex. 4-C, U-37 and 38 and Plaintiff's Ex. 9 and 10).